STATE OF MICHIGAN

IN THE SUPREME COURT

MATTHEW BARRETT,
Plaintiff-Appellee,

v

MT. BRIGHTON, INC.,
Defendant-Appellant.

SC: 126544
COA: 222777
Livingston CC: 97-01629-NO

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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BARRETT V MT. BRIGHTON, INC.

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

The Court of Appeals was directed by the Supreme Court in October 2003 to reconsider its earlier opinion in light of the Supreme Court's holding in *Anderson* v *Pine Knob Ski Resort, Inc*, 469 Mich 20; 664 NW2d 756 (2003). The Court of Appeals, in *Barrett* v *Mt. Brighton, Inc*, (Docket No. 222777, June 3, 2004), answering this Court's directive, concluded that a distinction between the various types of skiing is appropriate when analyzing the risks inherent in each type of skiing, such as traditional alpine skiing or snowboarding. The court held that "snowboard rails are not inherent in the sport of downhill skiing" and an "alpine skier would not expect to be confronted with a snowboard rail in the course of alpine skiing" and "should not be expected to encounter a snowboard rail during the course of downhill skiing."

The Court of Appeals additionally analyzed MCL 408.326 in accordance with this Court's directive in the October 2003 order and held that "Pursuant to MCL 408.326a(c) and (e), this snowboard skiing area should have, at least, been marked with an appropriate symbol indicating the relative degree of difficulty of the skiing area which, according to the recently enacted 1999 AACS, R 408.81, would be characterized as 'most difficult' compared to other possible designations of 'easiest' and 'more difficult.'"

On April 15, 2005, the Supreme Court of Michigan directed the Clerk of the Court to schedule oral argument on whether to grant the Defendant-Appellant's Application or take other peremptory action permitted by MCR 7.302(G)(1). This Court enumerated specific issues to be addressed among the issues at oral argument and has invited the parties to file supplemental

briefs. Each of the issues noted in the Court's April 15, 2005, Order shall be discussed in turn, although because of the relationship of the issues some will be discussed as a group.

LAW AND ARGUMENT

(1) IN THE FACTS OF THIS CASE, WAS THE SNOWBOARD RAIL A DANGER THAT INHERES IN THE SPORT OF SKIING THAT WAS "OBVIOUS AND NECESSARY" WITHIN THE MEANING OF MCL 408.342(2)?

(2) IN CONSIDERING WHETHER THERE ARE OBVIOUS AND NECESSARY DANGERS, IS IT APPROPRIATE TO CONSIDER THE VARIOUS TYPES OF SKIING (E.G., TRADITIONAL DOWNHILL SKIING, SNOWBOARDING, ETC.)?

The Michigan Legislature has singled out only two sports in which the common-law of torts regarding recreational activities is modified. Skiing is, of course, one of these sports as set forth in the Ski Area Safety Act, MCL 408.321, *et seq.* (SASA). The preamble of the Act sets forth that, among other directives, it was "to provide for the safety of skiers, spectators, and the public using ski areas." The Legislature recognized that skiing is a sport not without risk but that the risks of skiing at a ski area also do not create blanket immunity for operators of ski areas. In this issue of first impression, this Court is called upon to determine if a snowboard rail – a manmade object that is not essential to skiing – falls within the immunity provisions of the statue.

Recognizing the potential dangers of the sport of skiing, the Legislature set forth the duties of a skier and their acceptance of the dangers of the sport in MCL 408.342 which states, in pertinent part, as follows:

> (2) Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.

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A fundamental rule of statutory construction is to ascertain the purpose and intent of the Legislature in enacting the provision. *Kent* v *Alpine Valley Ski Area, Inc,* 240 Mich App 731; 613 NW2d 383 (2000). The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted and courts must apply the statute as written. *Id.* The Legislature, by the language used in the statute has made it clear that skiers must accept certain dangers, but only those dangers that "inhere in that sport" and only if the dangers that inhere in the sport are "obvious and necessary." The Legislature has not provided ski area operators with blanket immunity.

When a word is undefined in a statute, resort to the standard dictionary definition is an appropriate means of determining its common and approved usage. *Horace* v *Pontiac,* 456 Mich 744, 756, 575 NW2d 762 (1998). The ordinary meaning of the term "inhere," as set forth in Webster's New Twentieth Century Dictionary is:

> **Inhere**, v.i.; inhearsed, pt., pp.; inhering, ppr. [L. *inhœrere*, to stick in, to adhere, or cleave to; *in*, in and *hœere*, to stick.] to exist or be fixed in; ***to be an inseparable part of something***; to be a member, adjunct, or quality of something to be inherent or innate.

Webster's New Twentieth Century Dictionary 2d Ed. (1972) at 943 (emphasis added). The language used by the Legislature is clear and unambiguous: skiers accept dangers that are inseparable from the sport of skiing. If a danger exists that is not inseparable from the sport of skiing then the ski area operator could be liable for the resulting injury. For a particular danger to be inseparable from skiing, the sport cannot be performed without the danger; remove the danger and the sport no longer exists. This was recognized by the Michigan Court of Appeals in *Schmitz* v *Cannonburg Skiing Corp*, 170 Mich App 692; 428 NW2d 742 (1988), when the court stated:

> However, it is clear from the ***plain and unambiguous wording*** of §22(2) that the Legislature intended to place the burden of certain risks or dangers on skiers, rather than ski resort operators. Significantly, the list of "obvious and necessary" risks assumed by a skier under the statute involves those things resulting from natural phenomena, such as snow conditions or the terrain itself; natural obstacles, such as trees and rocks; and types of equipment that are inherent parts of a ski area, such as lift towers and other such equipment when properly marked. These are all conditions that are inherent to the sport of skiing. It is safe to say that, generally, ***if the "dangers" listed in the statute do not exist, there is no skiing***.

Schmitz, 170 Mich App at 696; 428 NW2d at 744 (emphasis added). This analysis of the Court of Appeals was quoted with approval by the United States Court of Appeals, Sixth Circuit, in *Shukoski* v *Indianhead Mountain Resort, Inc*, 166 F3d 848, 850 (1999).

The SASA does not establish complete immunity for ski area operators. It establishes the duties and responsibilities of both the skier and the ski area operator. It recognizes that although skiing is a dangerous sport where the skier must recognize that he or she is engaging in a sport in which injury could result, there are certain instances where a skier could be injured because they have encountered a condition that is not generally expected to be encountered in the sport. If it is a condition that is inseparable to the sport of skiing and is obvious and necessary to the sport, then the immunity does not attach and the injured skier is free to pursue his or her theories of negligence against the ski area operator.

This Court, in *Anderson* v *Pine Knob Ski Resort, Inc*, 469 Mich 20; 664 NW2d 756 (2003), recognized that the structure of the statute must be analyzed when determining if the collision with an object was "obvious and necessary." This Court noted:

> This subsection identifies two types of dangers inherent in the sport. The first can usefully be described as ***natural hazards*** and the second as ***unnatural hazards***. The natural hazards to which the act refers without limit are "variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris...." MCL § 408.342(2). The unnatural hazards include "collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment." MCL 408.342(2).

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Anderson, 469 Mich at 23; 664 NW2d at 756. A snowboard rail is clearly an "unnatural hazard." Man-made equipment is NOT a terrain variation or what this Court has characterized as a natural hazard. Any man-made object that is placed in or on the terrain is what this Court has described as an unnatural hazard, like a ski lift pole or snow making equipment.

Anderson raises the potential issue of whether the different forms of skiing should be considered when determining what is meant by "inhere in the sport of skiing." Skiing takes on many forms or subsets including alpine or traditional downhill skiing on two skis that also encompasses recreational skiing, freestyle skiing and racing; snowboarding can include recreational snowboarding, freestyle and aerobatic snowboarding as well as racing and different forms of skiing for amputees and paraplegics. Other forms of skiing meld cross-country and downhill skiing.

It is not necessary to consider all the forms of skiing when analyzing this case because it is clear that a snowboard rail is not necessary to the sport of snowboarding. Snowboarding exists without adding snowboarding rails to the trail. Indeed, Defendant-Appellant eventually removed the snowboard rail because snowboarders were not using it. And yet snowboarders frequented Mt. Brighton before the installation of the rail and continued to frequent Mt. Brighton after – proof that it is not inherent in the sport of skiing or snowboarding. If Mt. Brighton were to remove its chairlifts no one would ski there again – chairlifts are necessary to the operation of a ski area, snowboard rails are not. The snowboard rail in this case cannot be equated to the timing shack in *Anderson* because this Court held that timing was necessary to ski racing. All parties apparently agreed to this concept and to the proposition that for the timing equipment to function that it had to be protected from the environment. If there is no timing equipment then arguably there is no ski racing. This is not true of snowboard rails and snowboarding.

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Even if this Court were to conclude that snowboard rails are inherent in the sport of skiing, this would not end the analysis. This Court noted in *Anderson* that "once hazards fall within the covered category, only if they are unnecessary ***or not obvious*** is the ski operator liable." *Id,* 469 Mich at 26; 664 NW2d at 760. In *Anderson*, this Court held that a timing shack was necessary to the sport of ski racing and that it was "obvious in its placement at the end of the run." *Id.* This Court concluded that it was a hazard "of the same sort as the ski towers and snow-making and grooming machines to which the statute refers us." *Id.* The timing shack was an obvious danger; the snowboard rail is not obvious under any analysis.

(3) DID MCL 408.326A(D) OBLIGATE DEFENDANT TO MARK THE TOP OR ENTRANCE OF THE SUBJECT SKI SLOPE AS BEING CLOSED TO ALL BUT THOSE WHO WERE SNOWBOARDERS?

(4) DID MCL 408.326A(C) OBLIGATE DEFENDANT TO MARK THE TOP OR ENTRANCE OF THE SUBJECT SLOPE AS "MOST DIFFICULT?"

(5) DID MCL 408.326A(E) OBLIGATE DEFENDANT TO MAINTAIN A TRAIL BOARD IN THE SKI AREA LABELING THE SUBJECT SKI SLOPE AS "MOST DIFFICULT?"

This Court in its October 2003 Order directed the Court of Appeals to consider the issues noted above. Generally, "issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v University of Michigan,* 444 Mich 211; 507 NW2d 422 (1993). This Court deviates from this rule in the face of exceptional circumstances. *See, Perin v Peuler,* 373 Mich 531, 534; 130 NW2d 4 (1964), where the issue's resolution was necessary to quell confusion generated by the Court's earlier opinions.

The issues regarding the marking of the ski trail were discussed in the trial court briefs and at oral argument relative to MCL 408.326a(d). Relative to MCL 208.326a(c) and (e), the issue was raised by the Court of Appeals while expanding its response to this Court's directive

discussing all of MCL 408.326a, therefore, the issues associated with this section of the SASA are properly preserved for appeal.

The relevant sections of the SASA state, in pertinent part as follows:

> (c) Mark the top of or entrance to each ski run, slope, and trail to be used by skiers for the purpose of skiing, with an appropriate symbol indicating the relative degree of difficulty of the run, slope, or trail, using a symbols code prescribed by rules promulgated under section 20(3).
>
> (d) Mark the top of or entrance to each ski run, slope, and trail which is closed to skiing, with an appropriate symbol indicating that the run, slope, or trail is closed, as prescribed by rules promulgated under section 20(3).
>
> (e) Maintain 1 or more trail boards at prominent locations in each ski area displaying that area's network of ski runs, slopes, and trails and the relative degree of difficulty of each ski run, slope, and trail, using the symbols code required under subdivision (c) and containing a key to that code, and indicating which runs, slopes, and trails are open or closed to skiing.

The Michigan Administrative Code Ski Area Safety Board General Rule 21 states:

> R 408.81 Trail marking.
>
> Rule 21. (1) As required by the act, the ski area operator shall mark each ski run, slope, or trail with the appropriate symbol for the degree of difficulty, the degree of difficulty in words, and the name of the run, slope, or trail.
>
> (2) Each ski area operator shall select its most difficult slopes and trails and use the black diamond symbol to identify them and select its easiest slopes and trails and use a green circle symbol to identify them.

The unrestricted access of alpine skiers to this area of Mt. Brighton contributed to this accident. James Bruhn, general manager of Mt. Brighton, testified that the area where Plaintiff was injured was off-limits to alpine skiers and, when detected in the area, were told to leave by the ski patrol or through a PA announcement. [Bruhn Tr at 10] The Trail Map [Marked as Exhibit 1 to Mr. Bruhn's deposition] shows the area of the half-pipe and the snowboard rail. This area is to the left of the Black Triple Chair and is shown to be either "easiest" or "more difficult." The ranking is difficult to discern. Regardless it is not marked as "most difficult." Under any

analysis, terrain that contains a half-pipe that is off limits to most of the skiers using Mt. Brighton and has obstacles and hazards designed for performing stunts and tricks is "most difficult" and should have been so marked. As noted by the Court of Appeals in its June 3, 2004, opinion: "Defendant's failure to do so constitutes a violation of the SASA which resulted in plaintiff (1) skiing into the snowboarding area, without notice or warning of the snowboard rail, (2) colliding with the snowboard rail and (3) sustaining injuries."

RELIEF REQUESTED

Accordingly, Plaintiff-Appellee Mathew Barrett respectfully requests that this Honorable Court deny Defendant-Appellant's Application for Leave to Appeal, or in the alternative summarily affirm the opinion of the Court of Appeals and the Livingston County Circuit Court denying Defendant's Motion for Summary Disposition.

Respectfully submitted,

LISS AND ASSOCIATES, P.C.

Nicholas S. Andrews (P42693)
Attorney for Plaintiff-Appellee

Dated: May 12, 2005

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STATE OF MICHIGAN

IN THE SUPREME COURT

MATTHEW BARRETT,
Plaintiff-Appellee,

v

MT. BRIGHTON, INC.,
Defendant-Appellant.

SC: 126544
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PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

SONYA WATT, being first duly sworn, deposes and says that on the 12th day of May, 2005, she served a copy of Plaintiff-Appellee's Supplemental Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal upon Ronald S. Lederman, 25800 Northwestern Highway, Southfield, Michigan, and deposited same in the United States mail, first class postage.

Sonya Watt
SONYA WATT, Deponent

Signed and sworn to before me in Oakland County, Michigan on May 12, 2005.

Tamera R. Nuttle
Tamera R. Nuttle, Notary Public
State of Michigan, County of Oakland
My commission expires: 8/11/05

TAMERA R. NUTTLE
NOTARY PUBLIC OAKLAND CO., MI
MY COMMISSION EXPIRES Aug 11, 2005

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May 12, 2005

Michigan Supreme Court
Attn: Clerk of the Court
925 W. Ottawa
Lansing, Michigan 48915

Re: Matthew Barrett v Mt. Brighton Incorporated
Supreme Court Case No. 126544
Court of Appeals No. 222777
Livingston County Circuit Court No. 97-16219 NO

Dear Sir/Madam:

Enclosed for filing with the Michigan Supreme Court in the referenced matter, please find eight (8) copies of the following document:

- Plaintiff-Appellee's Supplemental Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal

Very truly yours,

LISS AND ASSOCIATES, P.C.

Nicholas S. Andrews

NSA/jmp
Enclosures

cc: Ronald S. Lederman, Esquire

STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and Circuit Court for the County of Livingston)

MATTHEW BARRETT,

Plaintiff-Appellee,

-vs-

MT. BRIGHTON INCORPORATED, a Michigan corporation,

Defendant-Appellant.
_____/

Supreme Court No: 126544
Court of Appeals No: 222777
L.C. No: 97-16219-NO

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SULLIVAN, WARD, ASHER & PATTON, P.C.

NOTICE OF HEARING

MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT-APPELLANT MT. BRIGHTON, INC.

PROOF OF SERVICE

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STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and Circuit Court for the County of Livingston)

MATTHEW BARRETT,

Plaintiff-Appellee,

-vs-

MT. BRIGHTON INCORPORATED, a Michigan corporation,

Defendant-Appellant.

Supreme Court No: 126544
Court of Appeals No: 222777
L.C. No: 97-16219-NO

NOTICE OF HEARING

TO: COUNSEL OF RECORD

PLEASE TAKE NOTICE that the Motion for Extension of Time to File Supplemental Brief in Support of Application for Leave to Appeal on behalf of Defendant-Appellant will be presented to this Court for a determination on Tuesday, May 24, 2005, or at such date and time thereafter as is determined by the Court.

Respectfully submitted,

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

By: _____

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Dated: May 11, 2005
W0406739

STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and Circuit Court for the County of Livingston)

MATTHEW BARRETT,

Plaintiff-Appellee,

-vs-

MT. BRIGHTON INCORPORATED, a Michigan corporation,

Defendant-Appellant.
_____/

Supreme Court No: 126544
Court of Appeals No: 222777
L.C. No: 97-16219-NO

MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT-APPELLANT MT. BRIGHTON, INC.

NOW COMES Defendant-Appellant, Mt. Brighton, Inc., by and through its attorneys, Sullivan, Ward, Asher & Patton, P.C., and, for its Motion for Extension of Time to File Supplemental Brief in Support of Application for Leave to Appeal, hereby states as follows:

1. On April 15, 2005, the Michigan Supreme Court entered an Order upon Defendant's Application for Leave to Appeal. (See: EXHIBIT A). In this Order, the Court:

(a) Directed the Clerk of the Court to schedule oral arguments on whether to grant the Application or take other peremptory action; and,

(b) Permitted the parties to file supplemental briefs within 28 days of the date of the Order, or May 13, 2005.

2. Defendant requests a two week extension of time in which to file its Supplemental Brief for the following reasons:

(a) The undersigned counsel for Defendant has had a number of appellate briefing deadlines which have inhibited the timely research and preparation of the Supplemental Brief in this action; and,

(b) Defendant has been advised by the Clerk's office of the Supreme Court that oral arguments will not be scheduled prior to October of 2005, thereby rendering a two week extension to be nonprejudicial to the Plaintiff or a burden upon the Supreme Court itself.

WHEREFORE, for the foregoing reasons, Defendant-Appellant Mt. Brighton, Inc., respectfully requests that this Honorable Court grant its Motion for Extension of Time to File Supplemental Brief.

Respectfully submitted,

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

By: _____

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